Decision 14-08-033 August 14, 2014

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Investigation on the Commission's own motion into the operations, practices, and conduct of Telseven, LLC, Calling 10 LLC dba California Calling 10, (U7015C), and Patrick Hines, an individual, to determine whether Telseven, Calling 10, and Patrick Hines have violated the laws, rules and regulations of this State in the provision of directory assistance services to California consumers.	Investigation 10-12-010 (Filed December 16, 2010)

(See Appendix A for a list of appearances.)

DECISION DIFFERENT TO MODIFIED PRESIDING OFFICER'S DECISION FINDING THAT CORPORATE RESPONDENTS AND PATRICK HINES PLACED UNAUTHORIZED CHARGES ON CALIFORNIA TELEPHONE BILLS AND CLOSING PROCEEDING

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1. Summary

This decision holds that all charges placed on California subscribers' telephone bills by Telseven, LLC, and Calling 10 LLC dba California Calling 10,[1] (corporate respondents) were not authorized by the subscriber, and orders the corporate respondents and individual respondent Patrick Hines to pay reparations. Corporate respondents and Mr. Hines are also ordered to pay a fine of $19,760,000 to the General Fund of the State of California. All California local exchange carriers are prohibited from providing billing and collection services to any entity in which respondent Patrick Hines has an ownership or management interest. This proceeding is closed.

2. Procedural History

The Commission on its own motion on December 16, 2010, instituted this enforcement investigation into the operations, practices, and conduct of Telseven, LLC (Telseven), Calling 10 LLC dba California Calling 10 (Calling 10), and Patrick Hines (Hines), to determine whether Telseven, Calling 10, and Hines have violated the laws, rules and regulations of this State in the provision of directory assistance services to California consumers.

On June 10, 2011, a Prehearing Conference was held adopting the schedule noted in the Scoping Ruling dated June 21, 2011. The Scoping Ruling also

[1] The operating authority of California Calling 10 was revoked by the Commission in Resolution T-17359 on April 19, 2012.

designated the assigned Administrative Law Judge (ALJ), Maribeth A. Bushey, as the Presiding Officer.

Evidentiary hearings were held in this proceeding on November 15, 16, and 17, 2011. At the conclusion of those hearings, the parties had not completed their evidentiary presentations. On April 5, 2012, the Presiding Officer ruled that four additional exhibits would be received into evidence and the record closed. The ruling also set a schedule for filing and serving opening briefs on April 6, 2012, and reply briefs on May 4, 2012. With the filing of the reply briefs, the proceeding was to be submitted for consideration by the Commission.

On April 20, 2012, Telseven and Calling 10 filed voluntary petitions for bankruptcy protection in the United States Bankruptcy Court for the Middle District of Florida. On September 17, 2012, the Bankruptcy Court granted the Commission's motion to lift the automatic stay and authorized the Commission to "take actions necessary and appropriate to adjudicate with finality the claims asserted against the [Telseven and Calling 10]." The Court, however, prohibited the Commission from taking any steps to enforce any monetary judgment against the Telseven and Calling 10 other than through the bankruptcy proceeding or against parties other than Telseven and Calling 10.[2]

On November 28, 2012, the Presiding Officer granted the motion of counsel for Telseven, Calling 10, and Hines to withdraw as counsel of record. Since that motion, respondents have not participated in this proceeding.

On March 28, 2013, the Commission's enforcement staff, known as the Consumer Protection and Safety Division when this proceeding began but now

[2] Order Granting California Public Utilities Commission's Motion to Determine the Automatic Stay Inapplicable, or in the alternative, for Relief from the Automatic Stay, Case No. 3:12-bk-02683-PMG (September 7, 2012).

known as the Safety and Enforcement Division (SED), filed its motion to align this proceeding with a class action settlement in *Nwabueze v. AT&T California (AT&T)*, Case No. CV 09-1529 SI.[3] In its motion, SED stated that the class action settlement agreement provided for AT&T to pay restitution to the "the majority of consumers billed for unauthorized charges" in this proceeding.[4] SED sought a Commission order finding that all charges placed on California bills by respondents were unauthorized, adding AT&T and Verizon California Inc. (Verizon) as respondents, and issuing an order to show cause why AT&T and Verizon should not be required to make full restitution to all customers of respondents.[5] SED stated that the claims process provided in federal class action settlement was inadequate and that the Commission should order AT&T and Verizon to make direct restitution to each and every customer billed by respondents.

AT&T and Verizon responded in opposition to the SED's motion on May 13, 2013.

On September 20, 2013, AT&T and Verizon filed and served status reports on their respective class action refund programs. AT&T's status report showed that their refund program is just getting underway and that AT&T will have a more complete assessment by February 17, 2014. Verizon's status report stated that amounts billed by respondents are not within the scope of that refund order. On February 18, 2014, AT&T filed its second status report explaining that due to an appeal of the class action settlement, the Federal Court has not yet issued a

[3] The class action settlement reached in *Moore v. Verizon* does not cover victims of Telseven's and Calling 10's cramming scheme.

[4] SED March 28, 2013, motion at 2.

final order. With the filing of the status reports, this matter was submitted for Commission consideration.

3. Evidence Presented

3.1. SED

SED presented largely undisputed evidence that respondents obtained control over approximately one million toll-free telephone numbers that had been previously assigned to other businesses.[6] When telephone subscribers dialed these numbers the subscriber would hear the following message:

> For a charge of 4, 99, please have a pen ready to write down our phone number. You can hang up and dial 10 15 15 8000. That number again is 10 15 15 8000. The number you have dialed has a new national directory assistance service. Please dial 10 15 15 8000. That number again is 10 15 15 8000 – to get information on the number you have just dialed and be connected to a new national directory assistance service, brought to you by Calling 10. Rates exclude federal universal service fee and administrative recovery fee. You can also dial 10 15 15 8000 702 555 1212 [sic], to be connected to a new national directory assistance service. Subject to terms and condition of service available at *www.Calling10.com*. For trouble reporting, you can email *service@Calling10.com*.

SED analyzed this message and concluded that it was misleading, and did not convey the true nature or full price of the service for the following reasons:

1. The subscriber is not informed that the number dialed is now out of service, that the original owner of the 800 number no longer uses it, or that the original owner (in some cases, the intended called party) is in no way connected with this marketing intercept.

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[5] *Id*. at 18.

[6] Hearing Exhibit 3 at 12; Hearing Transcript at 389.

2. The subscriber is not informed that telephone number being offered has no relation to the originally dialed number, and that the service being offered via the telephone number similarly has no relation to originally dialed number.
3. The first sentence contains two elements that have no apparent relationship to one another: "For a charge of 4, 99" and "have a pen ready to write down our phone number."
4. There is no disclosure of the total charge to the consumer, which is not $4.99, but typically about $7.00.
5. The 10 15 15 8000 number is similar to the 800 number that the consumer was typically trying to dial.
6. The 10 15 15 800[0] number is repeated three times in the next five sentences, with further inducements to call the number.
7. "Rates exclude federal universal service fee and administrative recovery fee" could be understood to mean that no universal service fee or administrative recovery fee applies.

SED presented its own analysts as witnesses to support its conclusions, as well as six consumer witnesses who uniformly disavowed authorizing a charge of $7.00 for directory assistance services.

3.2. Telseven and Calling 10

Telseven and Calling 10 presented testimony that its competitive assisted directory assistance service was an improvement in the way directory assistance was provided in California, particularly as an alternative to internet-based searches. By acquiring and using thousands of discarded toll free numbers, after a quarantine period, and then playing a short disclosure message to any person who called those numbers, Telseven and Calling 10 concluded that they provided a new directory assistance service that could be conveniently accessed via an equal access telephone number and that provided number history and a direct connection to a live operator.

As to the specific disclosure language set out above, Telseven and Calling 10 explained that they repeatedly worked with the local exchange carriers (LECs) to implement their instructions to modify and improve the messaging disclosures. Telseven and Calling 10 stated that each customer received several key pieces of information in the outgoing message: the cost of the call, the additional charges that apply, Calling 10's website, and an e-mail address for customer services. Thus, Telseven and Calling 10 concluded that the disclosures went above and beyond the regulatory disclosure requirements and current industry standard practice.

4. Discussion

4.1. Burden of Proof and Standard of Proof

In an investigatory proceeding launched by Commission staff in response to allegations of violations of the Public Utilities Code, Commission staff has the burden of proof, with the standard of proof being a preponderance of the evidence.[7]

Preponderance of the evidence usually is defined "in terms of probability of truth, e.g., such evidence as, when weighed with that opposed to it, has more convincing force and the greater probability of truth."[8] In short, SED must present more evidence that supports the requested result than would support an alternative outcome.

4.2. Reasonableness of Corporate Respondents' Business Model and

[7] Communications TeleSystems International, Decision (D.) 97-05-089, 72 CPUC2d 621, 633-4.

[8] In the Matter of the Application of San Diego Gas & Electric Company for a Certificate of Public Convenience and Necessity for the Sunrise Powerlink Transmission Project, D.08-12-058, *citing* Witkin, Calif. Evidence, 4th Edition, Vol. 1, 184.

Adequacy of Service Offerings and Price Disclosures

As set forth above, corporate respondents controlled approximately one million toll-free numbers as a marketing plan. No customer would intentionally dial these numbers as no person or business, other than this directory assistance service, was presently associated with these numbers, and the numbers which were once associated with a business or person had been through the quarantine period.[9]

Subscribers reaching any of the toll-free numbers would hear the message quoted above, directing the subscriber to call a specific direct access number.[10] Most subscribers, up to 95%, who heard the message did not place the second call.[11] However, for those who did, upon completing the second call, subscribers would be charged, and if able to negotiate a series of interactive options, were theoretically able to reach directory assistance services from Telseven and Calling 10.

No consumer witnesses appeared on behalf of corporate respondents and the only witness for corporate respondents was Mr. Hines. SED's witnesses explained that they would not use respondents' service as it was priced much higher than other competing sources of directory assistance, such as internet searches.[12]

As set forth below, we find that corporate respondents have failed to disclose to the subscriber the exact nature of the service being offered and the

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[9] *See* Exh. 3 at 11- 14 and documents cited therein.

[10] Direct access means that the call was not routed through a long distance service provider.

[11] Respondents Opening Brief at 53.

[12] *See*, e.g., Hearing Transcript at 145 and 151.

costs. Consequently, we find that all charges placed on California telephone bills by respondents were unauthorized, and therefore unreasonable.

We begin with the notion of controlling up to a million toll free numbers, with no apparent purpose other than to catch misdialers. Corporate respondents have presented no other purpose for controlling this number of toll-free but not-in-use telephone numbers. Thus, we conclude on the evidentiary record before us that the purpose of controlling vast amounts of toll-free numbers not otherwise in service is to capture subscribers who misdial toll-free numbers. We will evaluate respondents' service offerings and rate disclosures in the context of the audience to which the offerings and disclosures are being made.

Next, we turn to corporate respondent's recorded message played to callers reaching a toll-free number controlled by respondents. Rather than disclosing that the number reached is no longer associated with any business, other than directory assistance, the message creates the impression that dialing another number is how to reach your intended number:

> You can hang up and dial 10 15 15 8000. That number again is 10 15 15 8000. The number you have dialed has a new national directory assistance service. Please dial 10 15 15 8000. That number again is 10 15 15 8000 – to get information on the number you have just dialed.

This does not clearly convey to the subscriber that the subscriber has dialed a number no longer in use and that an expensive directory assistance service is being offered. Instead it entices the subscriber to call the number, "to get information on the number you have just dialed." Thus, we conclude that this message calculatedly fails to inform the subscriber of the service being offered and the charge for that service.

Finally, we look at what happens if the subscriber dials the 10 15 15 8000 number. SED presented unrefuted evidence that calls of only a few seconds

duration were charged the full $7.00 fee.[13] Thus, by simply completing the call and discerning that it is not the intended person or business, a subscriber has incurred a charge of $7.00 and received nothing of value from respondents. SED conducted an analysis of 1,000 calls to respondents' telephone number and demonstrated that 81.2% of subscribers hung up without interacting with the telephonic options at all, i.e., did not press any further digits after the called number.[14] Of the 18.8% of callers who did press additional digits, respondents and Hines on their behalf were unable to show what share, if any, ever received actual directory assistance.[15]

4.3. Did subscribers authorize the charges?

Pursuant to Public Utilities Code Section (Pub. Util. Code §) 451, "all charges demanded or received by any public utility . . . for any product . . . or any service rendered . . . shall be just and reasonable." Here, respondents' business model is to control vast amounts of otherwise unused toll-free numbers, and to refer callers who reach these toll free numbers to a directory assistance service, the charge for which is not dependent on actual use of the service. Especially in light of the unique features of the audience to which the reference is being made, i.e., misdialers, respondents must clearly inform these subscribers that (1) the number dialed is not associated with any business other than directory assistance, and (2) directory assistance service, with price terms, is being offered by dialing the subsequent number and that dialing the proffered

[13] Exhibit 3 at 30 – 34.

[14] Exhibit 8 at 12 – 13.

[15] *Id*. at 13 – 14.

number will result in a charge without any subsequent use of the directory assistance service.

The recorded notice fails to meet this standard. Subscribers reaching the no-longer-in-use toll-free numbers are not informed of the status of the number and instead are urged to call the subsequent number to reach the intended number. Similarly, the subscriber is not informed that the subsequent number is for a directory assistance service and that charges will apply upon completion of the call even absent any use of the directory assistance service. We conclude that subscribers were not informed of the nature and price of the service being offered and, lacking this basic information, the subscribers are in no position to validly authorize a charge for directory assistance service on their California telephone bills. Unauthorized charges are unreasonable and in violation of Pub. Util. Code § 451.

We conclude, therefore, that all charges placed on California telephone bills by Telseven and Calling 10 were not authorized by the telephone subscriber. Corporate respondents are subject to claims for reparations for all unreasonable charges billed to California subscribers and, pursuant to Pub. Util. Code § 2107, to a fine of up to $50,000 for each instance of unlawful billing.

4.4. Practical Limitation on the Commission's Ability to Obtain Corporate Reparations or Fines from Corporate Respondents

As set forth above, the corporate respondents and Hines have sought and obtained protection from the United States Bankruptcy Court. Any order from this Commission for reparations or fines will join the unsecured creditors currently assembled in the bankruptcy proceeding.

4.5. The Federal Court Claims Process

SED explained that the AT&T federal court class action settlement in *Nwabueze v. AT&T* covered all present and former AT&T customers who, from January 1, 2005, to January 1, 2013, had third-party charges placed on their bill through a billing aggregator. SED estimated that the federal court settlement process covered between 69% and 74% of the customers billed by respondents to this proceeding. The missing groups are customers from 2004 and Verizon customers. The *Moore v. Verizon* settlement does not cover the crammed customers of Telseven and Calling 10. SED also provided evidence that the AT&T settlement was likely to provide restitution to only 3% or less of class members.[16]

Enforcing reparations orders may be difficult because, in cases such as here, the perpetrators claim insolvency or no assets are apparently available to fund a reparations order.[17] In other instances, even where funds are available, the passage of time and customer relocation makes contacting wrongfully billed customers problematic because the local exchange carriers (LECs) do not retain forwarding information indefinitely.[18]

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[16] November 4, 2013 SED Motion for Official Notice of Recent Filings, Including by the Federal Trade Commission and Department of Justice in Nwabueze v. AT&T, which attached both the Federal Trade Commission's Memorandum of Law as Amicus Curiae (Amicus Brief), but also the Department of Justice's Statement of Interest, as well as AT&T's response to same.

[17] *See* e.g., Investigation on the Commission's own motion into the operations, practices, and conduct of Coral Communications, Inc. D.01-10-073.

[18] *See*, e.g., Communication TeleSystems International, D.99-06-005, three years after wrongful acts, contact information was available for only 24,000 out of 56,000 customers.

In 1999, when considering allegations of unauthorized billing the Commission emphasized the importance of obtaining reparations for customers and stated its Policy on Enforcement:

> Where Commission staff alleges that an entity has wrongfully obtained funds from consumers or that fines are required to deter any future such activity, the Commission must take all actions within its power to ensure that respondents' assets will be available to fund any ordered reparations or fines. Of course, there may be instances where, despite diligent efforts, no assets can be located; nevertheless, aggressive actions must be fully pursued.
>
> The Commission has previously relied on its authority over the Local Exchange Carriers (LECs), which often provide billing and collection services to telecommunications investigation respondents. See Sonic, 59 CPUC2d 30 (D.95-03-016) (ordering LECs to hold payments due to Sonic). Other administrative and judicial means exist to thwart asset flight.
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> Therefore, we reaffirm our policy of resolutely pursuing all assets which may be needed to fund reparations orders or fines. We direct CSD [Consumer Services Division] to consider from the outset of all enforcement cases any actions which could be taken to preserve such assets. We put on notice all entities which provide billing and collection services, including LECs and billing agents, that the Commission may direct them to provide information on billing services provided to respondents in future proceedings. We direct the General Counsel to explore all innovative administrative means which the Commission has authority to impose, and to consider whether any additional legislation is needed to expand our authority. The General Counsel should also consider and be ready to pursue judicial remedies to preserve assets for a potential reparations and fine order, or otherwise to enforce such an order through judicial means.

Notwithstanding this policy statement, in the case of Coral Communications, the Commission was ultimately unsuccessful in obtaining

reparations for customers due to the insolvency of the perpetrator and its billing agents:

> We are profoundly dissatisfied with the outcome of this proceeding. Coral and its billing agents unlawfully billed and collected millions of dollars from California consumers. Despite our best efforts, we have been unable to effectuate any return of those funds due to the intervening insolvency of Coral and the billing agents. We intend to aggressively maintain our "policy of resolutely pursuing all assets which may be needed to fund reparations orders or fines."[19]

The context of insolvency coupled with the passage of time -- some customers were billed by Telseven almost nine years ago -- lessens the likelihood of successfully implementing a reparations order. In the present instance, the AT&T federal court class action settlement nominally covers many of the customers wrongfully billed by Hines and his corporate entities, though we recognize that the AT&T settlement has its shortcomings and may only provide relief to 3% or less of members of the class. The billings from 2004 are the oldest and thus the most likely to be missing subscriber contact information. The remaining billings, through Verizon, comprise a smaller share of the total billings, and are similarly subject to the deterioration in customer contact information over time.

Pub. Util. Code § 2890 regarding cramming became operative on July 1, 2001.[20] The first sentence of this statute provides, "[a] telephone bill may only contain charges for products or services, the purchase of which the subscriber has

[19] *Id*. at 5, *citing* D.99-08-017 at 3.

[20] Pub. Util. Code § 2890(g).

authorized."[21] Telephone bills are the responsibility of Billing Telephone Corporations. Thus, under California law, Billing Telephone Corporations have been responsible for ensuring that no unauthorized charges are placed on their customers' telephone bills since at least July 1, 2001.

The Consumer Protection Initiative Decision, D.06-03-013, issued in March 2006, adopted a cramming regulation which reaffirmed the Commission's commitment to ensuring that carriers allow only authorized charges to be placed on their customers' telephone bills.[22] The Commission stated in D.06-03-013 that "[t]elephone companies, regardless of whether they originate a charge, have the ultimate responsibility for handling customer complaints."[23] The Commission further elaborated that this rule is merely a restatement of existing law:

> The cramming rules we adopt today establish, first and foremost, that "[t]elephone companies may bill subscribers only for authorized charges." P.U. Code § 2890(a) does not put any qualifications on its statement that a telephone bill may only contain subscriber-authorized charges. Thus a carrier's responsibility to avoid placing unauthorized charges on its customers' phone bills extends to situations where a charge may originate with a billing agent or third party vendor. This responsibility is the same regardless of whether the charge at issue is communications-related or non-communications-related.[24]

In D.06-03-013, the Commission adopted the following rule: "Billing for Authorized Charges Only: Telephone companies may bill subscribers only for

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[21] Pub. Util. Code § 2890(a).

[22] *See* D.06-03-013 at 89, 90.

[23] D.06-03-013 at 90 (citation omitted).

[24] D.06-03-013 at 92 (citations omitted; emphasis omitted).

authorized charges."[25] This rule merely particularized existing law and described existing Billing Telephone Corporations' responsibilities.

Most recently, the Commission formally reiterating already existing consumer protection rules in 2010. This restatement of the rules, with a revised General Order (GO) 168, Part 4, underlined existing carrier responsibility for unauthorized charges and clarified the responsibilities of Billing Telephone Companies to issue refunds for all unauthorized charges appearing on the bill. Specifically, in D.10-10-034, the Commission adopted a Revised GO 168, Part 4, California Telephone Corporation Billing Rules, which, among other things, held telephone corporations responsible for all unauthorized charges appearing on a customer's bill:

> The record shows that customers do not carefully check bills and often pay small charges, even if unauthorized, due to the time and inconvenience of disputing the charge. Ensuring comprehensive refunds for all unauthorized charges are available is essential to removing the reward for unauthorized billing. Billing Telephone Corporations must remain responsible for refunding up to one year after the bill, even if mistakenly paid by the subscriber. Billing Telephone Corporations must prevent or detect what the federal court called "fraudsters" from surreptitiously placing unauthorized charges on many bills, cheerfully refunding to those that complain, and pocketing the payments from the unsuspecting. To comprehensively address this situation for all wrongfully billed subscribers, all such subscribers must have access to refunds.
>
> The revised rules clarify that the Billing Telephone Corporation has an affirmative duty to investigate, not only when there are allegations of unauthorized billings, but also when there are reasonable grounds for concern. The revised rules also make

[25] GO 168, Part 4, C(a).

> clear that a Billing Telephone Corporation is responsible for refunding all unauthorized charges presented in its bill, regardless of whether the unsuspecting subscriber may have paid the charge.[26]

The LECs are in a unique position to prevent unauthorized billing and we require that they meet this responsibility. Pub. Util. Code § 2890, affirmed by D.06-03-013 and D.10-10-034, made it clear that carriers are responsible for ensuring that no unauthorized charges are on customers' bills. These carriers must be more diligent in the management of their billing and collection services to forestall the creation of patently unreasonable business models such as the one created by respondents in this proceeding. Billing telephone corporations are on notice that going forward, this Commission will hold them financially accountable for cramming that occurs on their telephone bills.

4.6. Penalties

When opening this Investigation, we found that our staff could recommend for our consideration, penalties pursuant to Pub. Util. Code §§ 2107 and 2108 in the amount of $500 to $20,000 per offense per day, as well as other penalties. In 2011, the Legislature passed SB 879 amending Pub. Util. Code § 2107 to increase the maximum penalty amount from $20,000 to $50,000 per offense.[27] This amendment went into effect on January 1, 2012.

SED recommended a fine of $19,760,000, based on the number of days respondents billed California customers multiplied by $10,000 per day, assessed against all respondents.[28] SED pointed out that respondents submitted

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[26] D.10-10-034 at 33-34.

[27] 2011 Cal Stats ch. 523.

[28] SED Opening Brief at 88.

unauthorized billings to over 3 million customers, for a total of about $21 million. SED stated that a fine for each billing, even at the lowest end of the range, would result in "an astronomical amount, in excess of a billion dollars."[29] SED, therefore, recommended using the per-day tabulation to achieve a fine that was reasonable and proportionate to the offenses.

In establishing an appropriate fine under Pub. Util. Code § 2107, the Commission considers two general factors: the severity of the offense and the conduct of the utility. In addition, the Commission considers the financial resources of the utility, and the totality of the circumstances related to the violations.[30] Commission precedent should also be considered when assessing fines.[31]

The amount of a fine imposed pursuant to Pub. Util. Code § 2107 must be proportional to the severity of the offense. As this proceeding's fact pattern illustrates, disregarding a statutory or Commission directive is accorded a high level of severity because compliance is absolutely necessary to the proper functioning of the regulatory process and the assurance of just and reasonable rates to consumers.[32] Here, while the severity of the offense rises to the higher levels of the range due to the duration and scope of the unauthorized billing, because this would result in an exceedingly high penalty, we will accept SED's recommendation of $10,000 per offense.

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[29] *Id*. at 90.

[30] Rulemaking to Establish Rules for Enforcement of the Standards of Conduct Governing Relationships Between Energy Utilities and Their Affiliates Adopted by the Commission in D.97-12-088, 84 CPUC2d 155, 182-84 (D.98-12-075).

[31] *Id.* at 184.

[32] *Id.*

In considering the conduct of the utility, the Commission reviews the utility's efforts to prevent, detect, and disclose and rectify the violation.[33] Here, there is no evidence that any respondent, including Hines personally or when acting on behalf of his corporate entities, made any effort to prevent, detect, or disclose and rectify the violation.

The size of the fine should reflect the financial resources of the utility. All of the corporate respondents here are subject to bankruptcy court protection. SED argues that though actual current and possible future resources are unknown, the scope of this fraudulent scheme requires a substantial fine.[34] The highest level of fine is required to deter future such conduct, and is consistent with the totality of the circumstances in furtherance of the public interest.[35]

While precedent also supports a fine at the high end of the spectrum, this precedent predates the increase in the maximum penalty amount per offense that went into effect as of January 1, 2012. In D.09-07-021, we fined the utility $10,000 per incident for each violation of a Commission order.[36]

No party opposed SED's recommendation.

We find that SED's recommendation is consistent with the Commission's guidelines for assessing fines and supported by the record. We, therefore, assess

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[33] *Id.* 183-184.

[34] SED Opening Brief at 89.

[35] *Id.*

[36] Application of California-American Water Company for Authorization to Increase its Revenues for Water Service in its Monterey District by $24,718,200 or 80.30% in the year 2009; $6,503,900 or 11.72% in the year 2010; and $7,598,300 or 12.25% in the year 2011 Under Current Rate Design and to Increase its Revenues for Water Service in the Toro Service Area of it Monterey District by $354,324 or 114.97% in the year 2009; $25,000 or 3.77% in the year 2010; and $46,500 or 6.76% in the year 2011 Under the Current Rate Design and Current Matters (D.09-07-021), 2009 Cal. PUC LEXIS 346, *120.

a fine pursuant to Pub. Util. Code §§ 2107 and 2108 of $19,760,000 against respondents jointly and severally, to be divided evenly between the corporate respondents and Hines. As SED notes in its Response of January 17, 2014, to the Appeal and Request for Review of Respondent Patrick Hines and to Commissioner Sandoval's Request for Review, Mr. Hines submitted himself to Commission jurisdiction when testifying as the only witness for the corporate entities he created and controlled. As SED points out, "it was only *after testifying* in the 2011 evidentiary hearings about the financial relationships among his entities, and *after* his claim that he was too poor to pay restitution to California consumers, and *after* filing bankruptcy petitions for his wholly-owned Telseven LLC and Calling 10 LLC, that Mr. Hines moved on April 6, 2012[,] to dismiss the claims against him personally."[37]

Pub. Util. Code Section 2889.9(b) provides that,

> If the Commission finds that a person or corporation or its billing agent that is a nonpublic utility, and is subject to the provisions of this section and section 2890 [cramming], has violated any requirement of this article, or knowingly provided false information to the commission on matters subject to this section and Section 2890, the commission may enforce sections 2012, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, and 2114 against those persons, corporations, and billing agents as if the persons, corporations, or billing agents were a public utility.

As SED further notes, Hines has not pointed to any business associate, partner or shareholder other than himself who might have been responsible for Telseven and Calling 10's unauthorized charges or the scheme which resulted in

[37] Response of the Safety and Enforcement Division (formerly Known as the Consumer Protection and Safety Division) to Appeal and Request for Review of Respondent Patrick Hines, and to Commissioner Sandoval's Request for Review, January 17, 2014, at 6. Emphasis in the original.

them.[38] The scheme and its execution did not derive from any action but those of companies Hines controlled and he was the sole witness for Telseven and Calling 10.

SED also seeks an order prohibiting all California LECs from providing billing and collection services to any entity in which Hines has an ownership or management interest. We will grant this request.

5. Presiding Officer's Decision, Appeals and Request for Review

On November 20, 2013, the Presiding Officer issued her Presiding Officer's Decision finding that all charges placed on California subscribers' telephone bills by respondents were unauthorized and requiring respondents to pay reparations for all such amounts. The Presiding Officer's Decision also imposed a fine of $19,760,000, jointly and severally, on respondents.

On December 18, 2013, the Commission's SED appealed the portions of the Presiding Officer's Decision that denied the Division's request that AT&T and Verizon be made parties to the proceeding, and instead that they should be ordered to show cause why they should not be required to promptly and directly refund all unauthorized Telseven and Calling 10 charges placed on California subscribers' bills.

On December 19, 2013, Hines, an individual, filed his appeal of the Presiding Officer's Decision and argued that the decision was unlawful in the following respects: (1) there is no evidence to support a finding that Respondent Hines is jointly liable for the acts of the LLC Respondents, (2) the Commission lacks subject matter jurisdiction over interstate telecommunications activities

[38] *Id*. at 15.

such as the provision of directory assistance by respondents, (3) SED presented no evidence to rebut the statutory presumption that "evidence that a call was dialed is prima facie evidence of authorization," and (4) Respondents provided service in accord with their tariff filed with this Commission in 2007 and, despite this notice, SED waited until 2010 to challenge the tariffed service.

On December 20, 2013, Commissioner Sandoval requested review of the Presiding Officer's Decision in respect to the conclusions that the Commission's consumer protection rules would not support an order that the billing telephone companies, AT&T and Verizon, refund all unauthorized charges placed on subscribers' bills, and that the Federal Court refund orders reasonably accomplished the Commission's enforcement objectives.

On January 17, 2014, Verizon and AT&T responded to the appeals and request for review. AT&T argued that the SED appeal and the request for review constitute a collateral attack on the AT&T settlement of the federal court litigation as providing insufficient refunds to Telseven customers. AT&T stated that the federal court has overruled such objections and approved the settlement. AT&T opposed SED's request that AT&T be found liable for Telseven's wrongdoing, and contended that the law and due process prevented that outcome on the record of this proceeding. AT&T also pointed out that should the Commission attempt to remedy the procedural and due process defects by holding further proceedings, any Commission order requiring further refunds to Telseven customers would inevitably conflict with the Federal District Court and, therefore, be a nullity. Finally, AT&T stated that Presiding Officer's Decision did not rely on D.10-10-034 as the basis of its order, contrary to the arguments put forth in the Appeal and Request for Review.

Verizon stated that it complied with the Commission's rules for refunds for third-party charges, and even went beyond to issue refunds whenever a customer complained about a third-party charge. Verizon concluded that only Telseven customers who have not requested refunds would be included in SED's appeal. Verizon examined the Commission's rulemaking history under Pub. Util. Code § 2890 and argued that the Commission first imposed an affirmative obligation to make refunds to customers who have not submitted complaints in 2010, after this proceeding had commenced. Verizon explained that it was able to locate only about 36% of customers from a recent class action settlement, covering billings from 2005 to 2012. Verizon concluded that even though the decision found that the respondents violated the Public Utilities Code and caused Verizon to include unauthorized charges on customers' bills, Verizon is not liable for restitution nor has Verizon violated its statutory obligations.

Due Process Issues

Respondent Hines argued that SED has failed to present sufficient evidence to set aside the corporate structure and hold him personally liable for the actions of Telseven and Calling 10, the corporate respondents. SED explained that the following facts support such a finding: (1) Hines is the sole owner of all the corporate respondents, (2) Hines controlled all activities of these respondents, (3) certain entities in the corporate chain were disregarded for tax and business purposes, and (4) Hines put the corporate respondents "into bankruptcy after hearing in this matter."[39] Respondent Hines countered that the corporate respondents maintained separate structures, with separate books, records, and bank accounts, and that each adheres to the corporate distinctions required under the laws of the state in which they are organized.

The Commission considered the standards for piercing the corporate veil and holding individual shareholders responsible for violations of the Public Utilities Code in Investigation of *Clear World Communications*.[40] There, the Commission declined to impose personal liability on a family of three brothers, one of whom had been previously convicted of a felony and served six months in jail, and their father, who, through several corporations, provided telecommunications services. In that proceeding, the Commission found that the Commission staff had presented no evidence that Clear World Communications

[39] SED Response to Appeal and Request for Review at 10.

[40] Investigation on the Commission's Own Motion Into the Fitness of the Officers, Directors, Owners and Affiliates of Clear World Communications Corporation, U-6039, Including Individual Officers, Directors and Shareholders James, Michael, and Joseph Mancuso, and Into the Conduct of Other Utilities, Entities, or Individuals (including Christopher Mancuso) Who or That May Have Facilitated the Mancusos' Apparent Unlicensed Sale of Telecommunications Services, Investigation 04-06-008, D.05-06-033.

was a sham corporation or other connections such as commingling of funds or the holding out by an individual that he is personally liable for the debts of the corporation. The Commission relied on *Associated Vendors v. Oakland Meat Co.*, 210 Cal App 2d 825, 836-842 (1962), which sets out a long list of possible factors for consideration by a Court when presented with a request to disregard the corporate entity. There, as here, the respondents were closely-held corporations, but in *Clear World Communications*, there was no showing that the corporate formalities were being ignored or that the individuals were using the corporation as a sham.[41]

The facts of *Clear World Communications* are clearly distinguishable from this case. Here, there is a clear showing that Hines directed the corporate respondents and testified on their behalf as their sole witness. His later disavowal of personal liability notwithstanding, the record is rich in this proceeding regarding Hines personal role in the ownership, benefit from, and control of the corporate respondents who would have been nothing without his actions. For example, SED stated in its Response to the Request for Review of Patrick Hines, and to Commissioner Sandoval's Request for Review:

> Because the *alter ego* analysis is fact-specific, the Commission's holding in *Clear World* does not apply here. In that case, there were not bankrupt Respondents (Respondent Clear World is still in operation), there was not sole ownership in one person, and

[41] We note that the Federal Communications Commission has issued Notice of Apparent Liability for Forfeiture, 12-65, June 14, 2012, finding that Telseven appeared to have violated federal laws and regulations with regard to mandatory contributions to the Universal Service Fund, administration of the North American Numbering Plan and local number portability, as well as information and regulatory fees filings. A forfeiture penalties totaling $1,758,465 is proposed. Relying on authority from the Federal Communications Act and precedent, the Federal Communications Commission holds Mr. Hines personally liable for the actions of Telseven because he owns, controls, and manages Telseven.

> there was "no evidence to show that Clear World [was] a sham corporation." Here, we have three different versions of Mr. Hines' signature on corporate documents, entities that Hines tells us are to be disregarded, and ultimate ownership that is now in other entities, based offshore in the British Virgin Islands."[42]

Moreover, *Clear World Communications* was primarily a slamming case, and the Commission did not find any underlying violation of the slamming or cramming statutes.[43] As discussed more fully below, because an alter ego theory is fact-specific, the fact that the Commission declined to impose personal liability in *Clear World Communications* does not speak to whether the Commission should impose personal liability here as the underlying facts of the two cases are distinct.

In this proceeding, SED discussed three different, but related rationales on which to hold Hines' personally liable: "(1) he was an alter ego of Telseven and Calling 10;[44] (2) he 'participated directly in the practices discussed above, and had the authority to control them,'[45] and/or (3) he 'specifically directed or authorized the wrongful acts.'"[46] The evidence that SED provided to support

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[42] SED Response to Appeal and Request for Review of Patrick Hines, and to Commissioner Sandoval's Request for Review, at 10 (citations omitted).

[43] SED Post-Hearing Reply Brief at 25.

[44] "The alter ego doctrine is grounded in equity, and said to apply only where two general requirements are met: first, there must be such a unity of interest and ownership that the separate personalities of the corporation and the controlling individuals or companies no longer exist; and, second, a failure to disregard the corporate entity must sanction a fraud or promote injustice. *Watson v. Commonwealth Ins. Co*, (1936) 8 C2d 61, 68. CPSD submits that Mr. Hines has admitted that key entities in his corporate chain are to be 'disregarded.' HT at 301:3-302:16. Allowing Mr. Hines to hide behind these entities would sanction a fraud and promote injustice." SED Post-Hearing Brief at 94.

[45] "*FTC v. Inc21, supra,* Slip Op. at 17, citing *FTC v. Publishing Clearing House, Inc.,* 104 F.3d 1168, 1170 (9th Cir. 1997)." SED Post-Hearing Brief at 94.

[46] "*Wyatt v Union Mortgage Co.,* 24 C3d 773, 785 (2007) ('Directors and officers of a corporation are not rendered personally liable for its torts merely because of their official positions, but may

Footnote continued on next page

that Patrick Hines is an alter ego of Telseven and Calling 10 includes evidence demonstrating that Hines owned (either directly or indirectly) all the entities involved in the scheme, that he changed these entities at his sole discretion, and that he controlled all aspects of that scheme, as evidence by the fact that Hines was Respondents' only witness at the hearings in this matter.[47] SED provided detailed information in the record of this proceeding regarding when it is appropriate to apply an alter ego theory:

> Whether an *alter ego* theory will lie, the corporate entity be disregarded, and personal liability attach, depends on the facts of a particular case.[48] Courts have considered an array of factors in analyzing alter ego problems, including but not limited to: commingling of funds and other assets; the treatment by an individual of the assets of the corporation as his own; sole ownership of all of the stock in a corporation by one individual or the members of a family; common addresses and business models; concealment or misrepresentation regarding the ownership, management, or financial interest of the subject entities; and the diversion of assets from a corporation by or to a stockholder or other person or entity, to the detriment of creditors.[49] Common ownership and a common business plan

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become liable if they directly ordered authorized or participated in the tortuous conduct')." SED Post-Hearing Brief at 94.

[47] SED Post-Hearing Brief at 94.

[48] "D.03-01-079 (*Titan* Investigation), Slip Op. at 16, citing *Alexander* v. *Abbey of the Chimes,* 104 CA3d 39, 46 (1980). In *Titan,* the *alter ego* theory was rejected on due process grounds, because the individual alleged to be the alter ego of the corporation had not been named in the original order instituting investigation. Slip Op. at 16-17." SED Post-Hearing Brief at 94-95.

[49] "*Id.*, citing *Associated Vendors, Inc.* v. *Oakland Meat Co., Inc.*, 210 CA2d 825, 838-840 (1962) (citations omitted) (finding that other factors include: " . . . the failure to maintain an arm's-length relationship among related entities. . . . the concealment and misrepresentation of the identity of the responsible ownership, management, and financial interest, or concealment of personal business activities . . ." and use of same address. *Id.* at 839-40 (citations omitted). *See also* SED Post-Hearing Brief at 95.

> may also be predicates of individual liability for corporate malfeasance.[50]
>
> As SED noted in the record of this proceeding:
>
> Respondents' misrepresentation or misdirection in data responses about the ownership of Respondent entities,[51] the common address used by these entities,[52] Mr. Hines' apparent sole direct or indirect ownership of all the involved entities, as well as his apparent and effective control over all operations of Respondents,[53] and his insistence that various entities in the Telseven/Calling 10 ownership chain were "disregarded entities for tax and business purposes,"[54] all indicate that this Commission likewise should disregard those entities for purposes of holding Mr. Hines liable for the fraudulent scheme described herein.[55]

Moreover, as SED noted in its Post-Hearing Brief, "it is important to send a message to other "fraudsters" . . . that the Commission will be vigilant in pursuing monies taken from California utility customers in an unfair, deceptive or illegal manner."[56]

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[50] "*Wyatt v. Union Mortgage, supra,* 24 C3d at 785-86 ("tightly knit, family-oriented business operation" where one individual "owned all or a controlling interest in each of the affiliated corporations")." SED Post-Hearing Brief at 95.

[51] "Compare Exhibit 4, Attachment 4 with HT 302; Section III(F) above." SED Post-Hearing Brief at 95.

[52] "*See, e.g.,* Exhibit 3, Staff Report at section II (A). Telseven and Calling 10 share the same business address and employ identical business model and billing methods." SED Post-Hearing Brief at 95.

[53] "Exhibit 4, Attachment 4; HT 302; Section III(F) above." SED Post-Hearing Brief at 95.

[54] "HT at 301 *ff.*" SED Post-Hearing Brief at 95.

[55] SED Post-Hearing Brief at 95.

[56] SED Post-Hearing Brief at 93.

Coordination with Federal Court Proceedings

We find that the Federal District Court has exercised jurisdiction over charges placed by respondents on AT&T subscribers' bills between 2005 and 2013.[57] Consequently, any refund of those charges may in this instance come through the Federal Court class action settlement. We recognize that the AT&T settlement does not limit this Commission from pursuing direct refunds via the carriers.[58] We also take note of the evidence SED produced which showed that very few customers are receiving refunds via the class action settlements.[59] We agree with SED that direct refunds would be the most effective way for consumers to receive relief in this case. However, we decline to name AT&T as a respondent and pursue further refunds of these charges before this Commission because in this instance, we think the passage of time has severely limited the effectiveness of any refunds for Telseven/Calling 10's unauthorized charges.

As for charges on Verizon bills, all requested refunds have been made and Verizon has presented a detailed description of the difficulty involved with a "restitution campaign" for the refunds that have not been requested as compared to the actual refunds likely to reach subscribers.[60] We note that Verizon did not

[57] The Commission also has jurisdiction over these charges and, absent the Federal Court's actions, could have asserted jurisdiction to order any needed refunds to customers.

[58] The settlement provides: "Excluded from the Settlement Class are any judicial officer to whom the Action is assigned, the United States government and any State government or instrumentality thereof." *Nwabueze v. AT&T*, U.S. Dist. Ct. No. Cal., Case No. CV 09-1529 SI, Settlement and Stipulation Agreement at 15; see also p. 30 & Exhibit 13.

[59] November 4, 2013 SED Motion for Official Notice of Recent Filings, Including by the Federal Trade Commission and Department of Justice in Nwabueze v. AT&T, which attached both the Federal Trade Commission's Memorandum of Law as Amicus Curiae (Amicus Brief), but also the Department of Justice's Statement of Interest, as well as AT&T's response to same.

[60] Verizon Response at 11.

provide any evidence of giving refunds to affected consumers who did not file complaints. However, due to the passage of time, even though Verizon customers are not covered by the class action settlements, we find that in this case, due to the passage of time, we will not add Verizon as a respondent and pursuing additional refund of Telseven charges billed by Verizon.

However, as we previously stated, going forward, AT&T, Verizon, and other billing telephone corporations are on notice that they are responsible for ensuring that all charges on their customers' telephone bills are authorized. While the Commission elects not do so in the instant case because of the passage of time, the Commission has the authority to order billing telephone corporations to make direct reparations to customers for cramming that they allowed to occur on their customers' bills, and may also be subject to fines. We want to make it clear to carriers that it is their responsibility to not only provide refunds to customers who complain, but also to provide refunds to all affected customers, whether they notice the unauthorized charge and complaint or not. The Commission will be more vigilant in this regard in ensuring that billing telephone corporations carry out their responsibilities.

Commission Authority over Billing Telephone Corporations

In 2010, as we noted above, the Commission concluded that notwithstanding GO 168, Consumer Bill of Rights Governing Telecommunications Services, and extensive efforts by the Commission, its staff, and the carriers, unauthorized charges continued to vex California telecommunications subscribers. The Commission pointed to complaints from deeply frustrated customers showing unauthorized charges that reappear on monthly bills despite extensive time and effort to dispute the charges. In D.10-10-034, the Commission adopted revised Part 4 to GO 168 to establish

reporting requirements to provide information to assist the Commission in identifying unauthorized billing, bringing it to a halt, and obtaining refunds for subscribers.

The Commission described its authority over Billing Telephone Corporations as delegated by the Legislature in 2001:

> In response to repeated and statewide unauthorized telephone billing scandals, the Legislature adopted stringent consumer protection standards for California telephone corporations providing billing and collection services to third parties. The Legislature also required the Commission to oversee third party billing on California telephone bills. The Legislature adopted specific statutory protections for subscribers, and allowed the Commission to "adopt rules, regulations, and issue decisions and orders, as necessary, to safeguard the rights of consumers and enforce the provisions of this article." (§ 2889.9(i).)
>
> Section 2890(a) places all authority for all charges on a telephone bill with the subscriber: "A telephone bill may only contain charges for products or services, the purchase of which the subscriber has authorized." Where a dispute arises about authorization, the same statute goes on to further protect the subscriber: "[i]n the case of a dispute, there is a rebuttable presumption that an unverified charge for a product or service was not authorized by the subscriber and that the subscriber is not responsible for that charge. (§ 2890(b)(2)(D).)
>
> For purposes of enforcement, the Public Utilities Code extends the Commission's jurisdiction over nonpublic utilities that generate a charge on a subscriber's telephone bill. Where the Commission finds that "a person or corporation" has violated §§ 2890 and/or 2889.9, the Commission is authorized to treat that person or corporation as if it were public utility for purposes of fines, contempt citations, and other penalties. (§ 2889.9(b).) The Commission also has explicit authority to order any billing telephone company to "terminate the billing and collection services" for any person or corporation failing to comply with these statutory sections. To assist the Commission in making this

> determination, the statute also directs the Commission to require each billing telephone corporation, billing agent, and service provider to report subscriber complaints to the Commission, and the Commission to initiate formal investigations as necessary. (§ 2889.9(d) and (e).)[61]

Thus, since 2001, California telephone bills may include only charges authorized by the subscriber and, where bills contain unauthorized charges, the Commission has authority to impose penalties and to order carriers to directly refund crammed customers. There is no dispute that pursuant to Pub. Util. Code §§ 2889.9 and 2890, the Commission may order carriers to directly refund customers who have been crammed and may use its extant authority to impose penalties, e.g., fines as provided in Pub. Util. Code § 2107, upon any billing telephone corporation that allows unauthorized charges on customer bills. The Commission affirmed this view in 2006 in D.06-03-013[62] and as recently as 2010 in D.10-10-034.[63]

Accordingly, we conclude that this Commission has the authority to proceed against billing telephone corporations, such as AT&T and Verizon, for violations of Pub. Util. Code §§ 2889.9 and 2890, with remedies to include fines for each instance of unauthorized billing as provided in Pub. Util. Code §§ 2107 and 2108, with all fines are payable to the State Treasury to the credit of the General Fund of California.

In the present instance, however, AT&T and Verizon were not named as respondents to this Investigation, and have not participated as parties to this

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[61] D.10-10-034 at 25 – 26.

[62] D.06-03-013 at 89-92.

[63] D.10-10-034 at 33-34, Attachment A at 3-5.

proceeding. Accordingly, exercising our authority over these billing telephone corporations at this point would require amending the Order Instituting Investigation or issuing an Order to Show Cause allowing the billing telephone corporations to show why the statutory liability should not apply.

While we agree with SED and the Federal Trade Commission (FTC) that the settlements appear to be "grossly inadequate,"[64] based on the unique history of this proceeding and the Federal Court proceedings, the public interest does not require this Commission to exercise its authority to initiate a further proceeding to impose fines on AT&T and Verizon.

6. Comments on Decision Different

The Decision Different of Commissioner Sandoval in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure.

Respondent Patrick Hines timely filed Comments on the MOD POD and Decision Different on July 21, 2014. With regard to Respondent's argument that the Decision Different fails to differentiate the *Clear World Communications case*,[65] Mr. Hines provided no convincing rational to justify changes to the result of the Decision Different as discussed above. For the reasons previously indicated, the Commission believes that the facts of *Clear World Communications* are distinct from the instant case. With regard to Respondent's argument that neither the MOD-POD nor the Decision Different should contain "a ban on provision of billing and collection services by all California local exchange carriers to any

[64] SED Appeal at 1.

[65] Patrick Hines Comments on MOD-POD and Decision Different at 8-9.

entity in which Patrick Hines has an ownership or management interest,"[66] again, Mr. Hines provides no compelling argument why the Commission should change this result.

Mr. Hines cites to several cases to support his argument that the Commission may not hold him personally liable for reparations or a fine. The disposition of this issue is the main difference between the MOD-POD and the Decision Different. None of the cases cited persuade the Commission to change its position, and in fact, do not appear to even support Respondent's position.

With regard to the first line of cases on sole direct ownership and effective control, Mr. Hines attempts to argue that the evidence in the proceeding is not sufficient to pin personal liability on him.[67] Respondent's quotation of Mother *Doe I v. Maktoum*, 632 F. Supp. 2d 1130 (S. D. FL. 2007) takes out of context the Court's discussion of the alter ego doctrine. In *Mother Doe I*, the Plaintiffs specifically "disclaimed reliance" on the alter ego doctrine and claimed that they were "not attempting to "pierce the corporate veil."[68] Instead, the Plaintiffs in that case argued that "the corporate acts detailed in their Complaint may be attributed to Defendants because the corporations are 'held beneficially' for Defendants."[69] The Court noted that "Plaintiffs' insistence that acts of corporate entities should be attributed to Defendants as individuals, despite their admission that they are not attempting to satisfy the 'alter ego' theory, is contrary to well-settled principles of corporate law, and Plaintiffs have cited no authority

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[66] *Id*. at 9.

[67] *Id*. at 5-6.

[68] *Mother Doe I v. Maktoum*, 632 F. Supp. 2d 1130, 1141 (S.D. FL. 2007) (emphasis in original) (citations omitted).

[69] *Id*. at 1140.

to support their position," and concluded that the Defendants may not be held personally liable.[70]

Respondent also cite to *Shafford v. Otto Sales Co*., 119 Cal. App. 2d 8499 (1953), which is the source of a long citation to eleven cases, to support his argument that "sole ownership and actual control are not enough to disregard the corporate veil."[71] The Commission does not disagree with this statement, but, rather, notes that Respondent failed to provide the full context for the Court's discussion. In *Shafford*, the Court stated that sole ownership and corporate control are not the only factors in determining whether to hold someone personally liable.[72] In discussing prior cases on the issue, the Court noted that:

> These cases recognize that the formation of even a one-man corporation to obtain limited liability is a proper objective *unless used for improper purposes*. They hold that complete stock ownership and actual one-man control will not alone be sufficient to impose liability on the individual. In the absence of confusion of corporate with individual affairs, or failing to disclose to third parties the existence of the two entities, *or abuse or bad faith in the exercise of corporate control*, the corporate entity will not be disregarded.[73]

Lastly, the Court in *Shafford* noted that "[t]here are other cases that contain some language somewhat inconsistent with some of the language in the above-cited cases, and in which the corporate entity has been disregarded where there was

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[70] *Id*. at 1141.

[71] Patrick Hines Comments on MOD-POD and Decision Different at 5.

[72] *Shafford v. Otto Sales Co*., 119 Cal. App. 2d 849, 862 (1953).

[73] *Id*. (emphasis added) (citations omitted).

one-man ownership and control, *but also at least some, if slight, evidence of unfairness, inequitable results, or confusion of parties*."[74]

Respondent's second line of cases concern his argument that entities for tax and business purposes are not enough to establish personal liability. Mr. Hines cites two cases, *People v. Pacific Landmark LLC*, 129 Cal. App. 4th 1203 (2d Dist. 2005) and *Greenspan v. LADT LLC*, 191 Cal. App. 4th 486 (2d Dist. 2010) for the proposition that there is "nothing sinister" about entities disregarded for tax purposes.[75] Rather than support Mr. Hines' claims, these cases tend the other way and support an argument in favor of holding him personally liable. Under *Pacific Landmark*, the Court found that the "manager" of an LLC could be held personally liable under certain circumstances:

> Given that the Legislature exposed limited liability company managers to liability under section 387 for their responsibility or actual authority for a public offense, it is reasonable to conclude that managers would not be shielded from personal liability by Corporations Code section 17158, subdivision (a) when they have actual authority over, or significant responsibility for, the wrong.[76]

The *Greenspan* case develops the theme that an individual may be held personally liable when the corporate entity is not "used for legitimate purposes" and is "perverted":

> 'When [the separate personality of the corporation] is abused it will be disregarded and the corporation looked at as a collection or association of individuals, so that the corporation will be liable

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[74] *Id*. (emphasis added) (citations omitted).

[75] Patrick Hines Comments on MOD-POD and Decision Different at 6.

[76] *People v. Pacific Landmark*, LLC 129 Cal. App. 4th 1203, 1214 (2d Dist. 2005).

> for acts of the stockholders or the stockholders liable for acts done in the name of the corporation.' . . .
>
> "There is no litmus test to determine when the corporate veil will be pierced; rather the result will depend on the circumstances of each particular case. There are, nevertheless, two general requirements: '(1) that there be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist and (2) that, *if the acts are treated* as *those of the corporation alone, an inequitable result will follow.*' . . .
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> "The essence of the alter ego doctrine is that justice be done.'. . . [L]iability is imposed to reach an equitable result.' . . . Thus the corporate form will be disregarded only in narrowly defined circumstances and only when the ends of justice so require."[77]

Notably, the Court in *Greenspan* did find alter ego liability, or at least the possibility of it, on very specific facts present in that case.[78]

The remaining three cases Respondent cites are intended to support his contention that the effect of bankruptcy is not enough to pin personal liability on him.[79] However, these cases appear to hurt Mr. Hines more than help him.

In the Decision Different, the Commission noted SED's argument that the timing of the bankruptcy is a factor the Commission can consider in determining whether to hold Mr. Hines personally liable.[80] Mr. Hines cites to *Leek v. Cooper*, 194 Cal. App. 4th 399, 418 (3d Dist. 2011), to support his proposition that "mere difficulty in enforcing a judgment is not alone sufficient justification to disregard

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[77] *Greenspan v. LADT LLC*, 191 Cal. App. 4th 486, 510-511 (2d Dist. 2010) (emphasis added) (citations omitted).

[78] *Id*. at 522.

[79] Respondent's Comments on MOD-POD and Decision Different at 7.

[80] Decision Different at 24.

the corporate form."[81] However, Mr. Hines' reliance on *Leek* seems misplaced; that case does not contain language to support his argument.[82]

Respondent's remaining two citations, *Shah v. Stillman*, 2004 Cal. App. Unpub. LEXIS 1753 (2d Dist. Feb. 26, 2004) and *Auer v. Frank*, 227 Cal. App. 2d 396 (1st Dist. 1964), discuss inadequate capitalization. Mr. Hines argues that "there was no evidence proffered that Telseven or Calling 10 were intentionally left without substantial capital or significant assets to avoid liability."[83] We disagree with Mr. Hines' statement. The evidence in the instant proceeding demonstrates that Calling 10 was, indeed, undercapitalized.[84]

We note as well the recent FTC action in a cramming scheme involving Andrew Bachman and the corporate entities controlled by him. As part of the terms of the settlement agreement, Mr. Bachman is banned from placing charges on consumer's telephone bills and must turn over the bulk of his personal assets:

> Under the terms of the settlement, Andrew Bachman will be permanently banned from placing any charges on consumers' phone bills, making any misrepresentations to consumers about a product or service or a consumers' obligation to pay, and will also be prohibited from charging consumers for a product or service without their express consent.
>
> The settlement also includes a monetary judgment of more than $97 million. The judgment is partially suspended based on

[81] Respondent's Comments on MOD-POD and Decision Different at 7.

[82] *Leek*, 194 CA 4th at 48.

[83] Respondent's Comments on MOD-POD and Decision Different at 7.

[84] *See* Ex 23, CCT 2658 (noting that Calling10 was capitalized with only $1000).

Bachman's inability to pay the full amount, after he turns over nearly all of his assets.[85]

Among the assets Bachman will be required to surrender under the terms of the settlement are:

- the contents of four bank accounts, less $4,500;
- two vehicles: a 2012 Ferrari 458 Italia and a 2012 Mercedes G550 SUV;
- shares in a number of startup companies; and
- jewelry items, including three Audemars watches, one Patek Phillippe watch, and four Rolex watches.[86]

SED timely filed a Response to Mr. Hine's Comments in support of the Decision Different on July 28, 2014.[87] SED also recommended four edits to the Decision Different which we incorporate herein.[88]

We also grant SED's outstanding July 18, 2012, and January 7, 2013 (FCC Notice of Apparent Liability of Hines et al), and March 29 and November 24, 2013 (filings in Nwabueze) Motions for Official Notice.

7. Assignment of Proceeding

Catherine J.K. Sandoval is the assigned Commissioner and Maribeth A. Bushey is the assigned ALJ and Presiding Officer in this proceeding.

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[85] FTC Press Release dated August 5, 2014, http://www.ftc.gov/news-events/press-releases/2014/08/operator-mobile-cramming-scheme-will-pay-more-12-million-ftc; http://www.ftc.gov/system/files/documents/cases/140731bullroarerstip.pdf.

[86] *Id.*

[87] SED Response to Patrick Hines Comments on MOD-POD and Decision Different at 2.

[88] *Id.* at Appendix A.

Findings of Fact

1. Respondents controlled up to one million toll-free telephone numbers.

2. Respondents offered no commercially reasonable purpose for controlling vast amounts of toll-free telephone numbers.

3. The only apparent purpose for controlling vast amounts of toll-free telephone numbers is to catch misdialers.

4. Respondents offered no evidence that any subscriber authorized charges for the services billed to the subscriber.

5. Respondents' recorded notice played to misdialers who reached one of the toll-free numbers controlled by respondents failed to clearly explain the nature of the services being offered and the price.

6. Respondents did not inform subscribers that they would be charged upon completion of the call to the direct access number.

7. Respondents have sought and obtained United States Bankruptcy Court protection, and reparations for unauthorized charges to California subscribers are unlikely.

8. Due to the passage of time from the dates of the unauthorized charges, up to nine years, many subscribes entitled to reparations will have moved and not be locatable.

9. LECs are responsible for ensuring that only authorized charges appear on subscribers' bills.

10. Corporate respondents' and Hines' violations are severe due to the duration and scope of the unauthorized billing.

11. Corporate respondents and Hines made no effort to prevent, detect, or disclose and rectify the violation.

12. Corporate respondents' and Hines' current and future financial circumstances are unknown.

13. The Federal District Court has exercised jurisdiction over charges placed by corporate respondents on AT&T customers' bills, although the Commission could still order its own refund program.

14. A Federal Court class action settlement against AT&T has made some refunds available to subscribers billed by corporate respondents.

15. The Federal Court refund program attempts to reasonably achieve the Commission's goal of reparations to unlawfully billed California subscribers.

16. AT&T and Verizon were not named as respondents in this proceeding.

17. Respondents ceased billing California customers in 2011.

18. The public interest in deterring violations of Pub. Util. Code §§ 2889.9 and 2890 by billing telephone companies has been reasonably achieved through the Federal Court Proceedings against AT&T and Verizon and by the penalties ordered in this proceeding.

Conclusions of Law

1. The burden of proof is on SED to show by a preponderance of the evidence that respondents violated California law or regulations.

2. SED presented substantial evidence that subscribers billed by corporate respondents were not informed of the nature of services being offered and did not authorize charges to their accounts.

3. Respondents presented no persuasive evidence of any subscriber knowingly authorizing charges for respondents' services to be placed on the bill.

4. All charges placed on California subscribers' bills by corporate respondents were unauthorized in violation of Pub. Util. Code § 2890, and are therefore unreasonable in violation of § 451.

5. Corporate respondents and billing telephone corporations are liable for reparations to all California subscribers billed by respondents.

6. Refunds available to California subscribers from the Federal Court class action settlements against AT&T attempt to reasonably achieve the Commission's enforcement goals.

7. Corporate respondents and Hines should be assessed a fine pursuant to §§ 2107 and 2108 of $19,760,000, to be allocated one-half to the corporate respondents and one-half to Mr. Hines.

8. All California LECs should be prohibited from providing billing and collection services to any entity in which Hines has an ownership or management interest.

9. Billing telephone corporations are responsible for monitoring telephone bills for unauthorized charges and for providing refunds to all consumers who have unauthorized charges on their telephone bills, whether or not those consumers complain to the billing telephone corporation.

10. Under Pub. Util. Code § 2890, AT&T and Verizon are responsible for ensuring that there are no unauthorized charges on their customers' telephone bills.

11. The Commission has the authority pursuant to Pub. Util. Code § 2890 to order AT&T and Verizon to directly refund affected customers.

12. Based on the unique history of this proceeding and the Federal Court litigations, the public interest does not require initiating an order to show cause proceeding to consider imposing fines on AT&T and Verizon or ordering AT&T and Verizon to directly refund affected customers.

13. This proceeding should be closed.

O R D E R

IT IS ORDERED that:

1. All charges placed on California subscribers' telephone bills by Telseven LLC, and Calling 10 LLC dba California Calling 10, and Mr. Patrick Hines acting through them, were unauthorized, and Telseven, LLC, and Calling 10 LLC dba California Calling 10, and Mr. Patrick Hines are ordered to pay reparations to each subscriber so billed in the total amount collected from that subscriber.

2. Telseven LLC, and Calling 10 LLC dba California Calling 10, and Mr. Patrick Hines, must pay a fine of $19,760,000, to be allocated one-half to the corporate respondents and one half to Mr. Hines, with Mr. Hines to be personally liable for a minimum of half the $19.76 million penalty; the fines are to be paid by check or money order payable to the California Public Utilities Commission and mailed or delivered to the Commission's Fiscal Office at 505 Van Ness Avenue, Room 3000, San Francisco, CA 94102, within 40 days of the effective date of this order. Write on the face of the check or money order "For deposit to the General Fund per Decision 14-08-033."

3. All money received by the Commission's Fiscal Office pursuant to the preceding Ordering Paragraph shall be deposited or transferred to the State of California General Fund as soon as practical.

4. All California local exchange and wireless carriers are prohibited from providing billing and collection services to any entity in which Patrick Hines has a direct or indirect ownership interest of ten percent or more, or in which he is an officer, director, or has substantial management authority.

5. Investigation 10-12-010 is closed.

This order is effective today.

Dated August 14, 2014, at San Francisco, California.

MICHAEL R. PEEVEY
President
MICHEL PETER FLORIO
CATHERINE J.K. SANDOVAL
CARLA J. PETERMAN
MICHAEL PICKER
Commissioners

APPENDIX A

********** **PARTIES** **********

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(END OF APPENDIX A)

EXPLANATION OF THE CHANGES MADE TO THE PRESIDING OFFICER'S DECISION

The substantive change to the Presiding Officer's Decision is to divide the fine amount of $19,760,000 between the corporate respondents Telseven and Calling 10, on the one hand, and individual respondent Patrick Hines, on the other. The total fine amount has not been changed. That fine is now to be divided evenly between the corporate respondents and Mr. Hines, with Mr. Hines to be personally liable for a minimum of half the $19,760,000 penalty. The Decision Different concludes that Mr. Hines did not point to any business associate, partner or shareholder other than himself who might have been responsible for Telseven and Calling 10's unauthorized charges or the scheme that resulted in them. The scheme and its execution did not derive from any actions but those of companies Mr. Hines controlled, and he was the sole witness for Telseven and Calling 10. Other changes to the text support this division of accountability, including that Patrick Hines is an alter ego of Telseven and Calling 10 for the purposes of this proceeding, with the evidence demonstrating that Mr. Hines owned (either directly or indirectly) all entities involved in the scheme, that he changed these entities at his sole discretion, and that he controlled all aspects of the scheme at issue. Findings of Fact and Conclusions of Law were changed accordingly and the revised Decision Different also adopts changes in wording suggested by the Commission's SED and Mr. Hines.

Other minor changes in language and typographical corrections were also made.